Property Law
2009-2010

Volume One

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NOTES
(from Jim Phillips, *Property Law: 2008-2009*)

1) Dickson J. states at one point that: There is nothing in the evidence supporting the view that in the present case the owner of the centre was acting out of caprice or whimsy or mala fides. Do you think his decision would have been different if the owner had acted so? In *Russo* v. *Ontario Jockey Club*, (1987), 62 O.R. (2d) 731 (H.C.J.) Russo argued that she could not be excluded from pari-mutuel betting facilities otherwise open to the public. The Jockey Club had banned her because she was a very skilled bettor and won too much. Boland J. simply followed Harrison, noting that if the Supreme Court refused to balance private property rights with picketing, there was even less of a case to be made for balancing property against a Aright to bet.@ Could it be argued that barring a person from facilities otherwise open to the public for betting because they won too often is certainly capricious and could well amount to bad faith.

2) In *Cadillac Fairview Corp. Ltd.* v. *R.W.D.S.U.* (1989), 71 O.R. (2d) 206 (C.A.) Cadillac Fairview, the owner of the Easton=s Centre in Toronto, sought to exclude union members from its property. The union was seeking to organise the workers at the Eaton=s department store, located wholly within the Eaton=s Centre. All access points to the store were within the Eaton Centre itself. The union stationed its organizers outside the entrance to Eaton's and within the Eaton=s Centre. Cadillac Fairview told them to leave.

One might think this case is exactly the same as *Harrison* v. *Carswell*, but the Court of Appeal allowed the union organisers access. It did so by applying the provincial *Labour Relations Act*. Robins J.A., having found that Cadillac Fairview was acting on behalf of the employer (a necessary finding under the Act to bring in a third party), also held that it had contravened s. 64 of the Act, which prohibited an employer or a person "acting on behalf of an employer" from participating in or interfering with the formation, selection or administration of a trade union. In doing so Cadillac Fairview had committed an Aunfair labour practice@ (a term of art under the Act.)

Cadillac Fairview argued that the Labour Relations Board, which had made the initial determination, had made an error in law. Robins J.A. summarised its arguments thus:

[The Labour Relations Board] had no jurisdiction to abrogate or interfere with its private property rights. Those rights. ... are absolute and cannot be impaired by the Board.... Cadillac Fairview ... is entitled (apart from leasehold arrangements with tenants) to exclude anyone it wishes from the shopping centre for any reason it deems appropriate.... Being in lawful possession of the premises, Cadillac Fairview was free to deny entry to persons engaged in union organizing activity. Any subsequent intrusion on the premises for this purpose would be an act of trespass in violation of the owner and occupant's private property rights. The reasons motivating the prohibition of this activity are irrelevant to the issue.... Cadillac Fairview argues that these decisions [*Peters* and *Harrison*] establish its right to exclude those engaged in the union organizational activity without any need to justify its action in so doing.... [O]n the law as articulated by the majority in *Harrison* v. *Carswell*, it has, vis-a-vis the union, an absolute right to control the use of the Eaton Centre.... Cadillac Fairview takes the further position that the Board would, in any event, have jurisdiction to abrogate property rights only if it were given express statutory authority to do so.@

Robins J.A. dealt with this argument by holding that the labour relations scheme statutorily enacted had impliedly, not expressly, limited *Harrison* v. *Carswell*. He stated:

A proper resolution of the property rights issue depends on an analysis of the statutory provisions applicable to the unfair labour practices complaint to be determined by the Board. The union's complaint was brought under s. 64 of the Act. This section, like similar provisions in other labour relations statutes in Canada and elsewhere, uses broad language in prohibiting employers, employers' organizations and persons acting on behalf of an employer or employers' organization from participating in or interfering with the formation, selection or administration of a trade union. The conduct that may be violative of s. 64 and thus constitute an unfair labour practice is not specifically proscribed in the Act. The prohibition is cast in general terms so as to provide employees with wide protection from interference with the rights and freedoms granted them under the Act. It is fundamental to the policy underlying the Labour Relations Act that employees have a right of self-organization and participation in lawful union activity. Section 3 guarantees that: AEvery person is free to join a trade union of his own choice and participate in its lawful activities.@

For those rights to be meaningful, it is manifest that employees must have access to union communications and opportunities for organizational activity. Having given employees the right to decide for themselves whether or not to join a union, the legislature can be assumed to have intended that they be permitted to make a free and reasoned choice. Such a choice necessarily implies that employees have access to union information free from restrictions that unduly interfere with the flow of information or their freedom of choice. The legislature can also be assumed to have recognized that the organizational rights guaranteed by s. 3 may come into conflict with traditional property and commercial rights in a variety of situations.... .If the employees are to exercise the rights contemplated by s. 3 it follows, as I said earlier, that they must have reasonable access to the union and opportunities for organizational activity. The obvious forum for such activity is the work place. It is there, after all, where employees share common interests and discuss matters of concern to their employment status; and it is there, and frequently only there, where employees whose support is sought by a union are reasonably accessible.

In this case, the Board was faced with a clear conflict of rights - the private property rights of Cadillac Fairview on the one hand, and the statutory organizing rights of the employees on the other. In weighing those conflicting rights to determine whether s. 64 had been contravened, the Board, in my opinion, was not obliged as a matter of law to treat Cadillac Fairview property rights as absolute. Its responsibility was to apply the general prohibitory language of s. 64 to the circumstances which formed the basis of the complaint. In other words, the Board was to decide whether Cadillac Fairview's conduct in prohibiting all organizing activity on its property in the circumstances of this case interfered with the employees' s. 3 rights in such a manner as to constitute an unfair labour practice. Section 64, as I noted earlier, is cast in broad terms and the conduct that might constitute an interference with the formation, selection or administration of a trade union is unspecified. Whether a particular form of conduct violates the section has been left to the judgment, discretion and expertise of the Board.

The relationship between the conduct proscribed by s. 64 and the rights protected by s. 3 mandates that the Board, in the exercise of its jurisdiction, resolve conflicts between property rights and organizational

rights. The resolution of the conflict will turn upon a balancing of those rights with a view to arriving at a fair accommodation between the interests sought to be vindicated by the assertion of the rights. The enforcement of s. 64 must contemplate incursions into the domain of private property rights and, as the complaint against Eaton's illustrates, into the domain of commercial and business rights as well. In my opinion, notions of absolutism have no place in the determination of issues arising under a statute designed to further harmonious labour relations and to foster the freedom of employees to join a trade union of their choice. In this area of the law, as in so many others, a balance must be struck between competing interests which endeavours to recognize the purposes underlying the interests and seeks to reconcile them in a manner consistent with the aims of the legislation.

3) *Harrison* v. *Carswell* has been cited in more than thirty subsequent cases, generally for the principle that a property owner may exclude whoever he or she wishes. The most unusual assertion of this principle is probably *Michelin & Cie* v. *C.A.W.* [1997] 2 F.C. 306 (T.D.). As part of a campaign to organise workers at Michelin plants in Nova Scotia the union distributed pictures of the AMichelin Man@ showing it with a foot raised to crush a Michelin worker. The court first decided that Michelin had copyright in the Michelin Man and then, having rejected a constitutional defence based on freedom of expression, used *Harrison* as support for the principle that Aprivate property [in this case a copyrighted image] cannot be used as a location or forum for expression.@

4) In *Committee for the Commonwealth of Canada* v. *Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.) the Supreme Court of Canada dealt with the issue of whether the federal government could bar people from distributing political propaganda and soliciting membership at an airport. As this was an action against government regulation the case turned on the freedom of expression guarantee in the *Charter of Rights*.

The Court held that the Charter protects the right to expressive activity in public airports. The judges did not agree, however, on much else, and six separate opinions were given. For current purposes the judgments of Lamer C.J.C., L'Heureux-Dube J. and McLachlin J. are important. L'Heureux-Dube J. held that there was a prima facie right to expression on all government property, and that any limitations must be justified under section 1 of the *Charter,* the limitation provision.

Lamer C.J.C. and McLachlin J. both held that there was an "internal" limitation within the freedom of expression guarantee. Lamer C.J.C. found that while government property was not like private property, and was presumptively a place where an individual had a right to express opinions, he or she could do so only if the form of the expression was compatible with the function of the place and did not interfere with the ordinary workings of the airport and the interests of the airport authorities and passengers. McLachlin J. focused both on the nature of the expression and on the forum. Some government property was traditionally "private", some traditionally "public". Once it was established that the property in question was the latter, and that the expression promoted one of the purposes for having a guarantee of freedom of expression, there was prima facie a breach, and any limitation had to be justified under section 1.

CHAPTER TWO:

POSSESSION AND TITLE AT COMMON LAW

(This chapter taken, with some alterations, from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION: WHAT IS POSSESSION?

The famous Canadian political theorist, C.B. Macpherson, observed that "[a]s soon as any society ... makes a distinction between property and mere physical possession it has in effect defined property as a right". This fundamental observation does not mean, of course, that possession is not a crucial concept in the common law of property. In fact, possession can be the origin of the property right. It is partly so in the law of transfer of title in personal property law, for example. Title is transferred if there is a sufficient combination of intention to do so and "delivery," and delivery, where appropriate, is a transfer of physical possession.

More importantly, and this is what this chapter is about, in a number of contexts possession can lead to the acquisition of title/right without a transfer from another. At common law objects not previously owned (wild animals, minerals for example) become the property of those who first possess them. This is what the first and second cases below, Pierson v, Post and Clift v. Kane, are about. In addition, objects owned but "lost" can become the property of those who find and possess them. This is the context for the second case, The Tubantia, and for the section on "finders."

Further, the law of adverse possession, which is detailed in the second half of this chapter, not only permits someone to acquire title to land, but to do so in a way that is "adverse" to the rights of another, the owner. Put more simply, one person can take land away from another.

Underlying the issue of what amounts to sufficient possession are, of course, some deeper questions. When a court holds that certain acts amount to sufficient possession in fact to award title in law, it does so for a reason (or reasons). Look for those underlying reasons in the judgments. They show us values which inform, indeed at times produce, the rules.

B) FINDERS: GENERAL PRINCIPLES

The law relating to finders of "lost" objects demonstrates both the importance of possession and the relative nature of title to chattels. The cases here show that the finder of an object can claim title to that object. This principle is often supported by reference to a classic English case, Armory v. Delamirie (1722) 93 E.R. 664, in which a chimney sweep found a jewel and carried it to a goldsmith to have it valued. The goldsmith kept the precious stones, and the chimney sweep sued successfully for their return. The court promulgated the following rule: "That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the owner."

Note that the last phrase tells us that the chimney sweep had "a" title, not "the "title. His title was not as good as the original owner's, because the latter was a prior title. The common law has a hierarchy of title according to chronology.

The statement from Armory is not quite correct, in two senses. First, although the owner's title usually survives a loss and a finding by another, it does not do so if the owner is considered to have abandoned his or her interest in the property. Abandonment is hard to establish and thus rare. It requires an intention to give up title, and mere loss does not convey such an intention. In Simpson v. Gowers, (1981), 121 D.L.R. (3d) 709 (Ont. C.A.) the Ontario Court of Appeal said: "Abandonment occurs when there is a giving up, a total desertion, and absolute relinquishment of private goods by the former owner." Abandonment can be inferred from the circumstances, with the best examples being sporting ones - baseballs being hit into the crowd during major league games are abandoned, as are golf balls hit into the water or trees (or the many other places I have lost golf balls).

Second, and conversely to the point about abandonment, the true owner may not be the only person with another claim to the property claimed by the finder. A prior finder might have such a claim, and prior title is better. Or the person on whose land the property was found may have a prior claim also, an issue discussed below.

These two additions to the Armory statement mean that the rule is the one stated by Ziff, Principles of Property Law, fourth edition, p. 134: "a finder acquires title good against the world, except for those with a continuing antecedent claim". That is, the finder's claim must be antecedent to other claims (true owner, prior finder, occupier) which must also be continuing claims (not abandoned).

it is a case of "finders keepers." I would therefore dismiss the appeal.

[Eveleigh L.J. and Sir David Cairns also wrote brief concurring judgments.]

(D) FINDERS AND ILLEGALITY

In Parker Donaldson L.J. states both that a trespassing finder always loses to the occupier, and that a "dishonest taker" has only a "frail" title. Both these assertions raise the issue of what effect an illegal act should have on property law's rules for the allocation of title. Should the law simply apply the rule that possession of the right kind makes a person a finder and therefore gives him or her a finder's title? Or should property law give way to other considerations.

The leading case on both trespassers and "dishonest takers" from the Ontario courts is still Bird v. Fort Frances, [1949] 2 D.L.R. 791 (Ont. H.C.), although many people think the reasoning in Parker should now prevail. In Bird a 12-year-old boy was crawling around in the basement of a pool-hall when he found a can with a large number of banknotes in it - c. $1,500. His "generous spending" alerted his mother to the windfall, and she gave it to the police. The owner was not traced, and the occupier of the pool hall did not make a claim. The issue was thus whether the money belonged to the boy or to the town. McRuer C.J.H.C. found for the boy. His judgment is long and confusing, but it did include an extensive canvassing of many older authorities, including:

> "The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights ... Even a wrongful possessor of a chattel may have full damages for its conversion by a stranger to the title, or a return of the specific thing." Oliver Wendell Holmes
>
> "The possessor need not have the further qualification of a title to possess. The facts of exclusive and exclusory control may be as true of a finder, borrower, pawnbroker, an honest non-owner who believes he is the owner, a trespasser, or even a thief, as they are of a true owner." Goodeve on Personal Property, 8th ed., pp. 38-9
>
> "If a finder has reason to believe that the thing is abandoned by its owner, then, whether or not it is so abandoned and whether or not a civil trespass is committed, there can be no theft at the first because there does not exist the belief that the appropriation will be invito domino which is essential for animus furandi. And a subsequent appropriation, even after discovery that the owner had no intention of abandonment, would seem to be within the principle of the immunity accorded by the modern decision to the pure finder. A taker upon a loss and finding may, like any other possessor, maintain trespass and theft ... against a stranger." Pollock & Wright on Possession, 1888, p. 187

McRuer C. J. also stated that Bird was not a "true finder," that is, "the money was not found in a public highway or public conveyance or in any place to which the public had access by leave or licence.... It was not lost in the sense that a wallet is lost if dropped in

the street." Thus: "The plaintiff had no right to remove it from the property of another, and undoubtedly was a wrongful taker." But, he continued, "it is not necessary for me to decide whether the taking was with felonious intent or not." This was because whether Bird was a "mere wrongful taker" (trespasser) , or whether he had "felonious intent," - "in this case the same result flows." That is: "In my view the authorities with which I have dealt justify the conclusion that where A enters upon the land of B and takes possession of and removes chattels to which B asserts no legal rights, and A is wrongfully dispossessed of those chattels, he may bring an action to recover the same."

Bird certainly says that the trespass makes no difference as such, although note the qualification in the above statement in the words "to which B asserts no legal rights." He is probably referring to any claim B might make as the occupier. The quotation in context also seems to suggest that an intent to steal, or a theft, makes no difference either.

The question of what kinds of illegality, if any, vitiate finders' title probably remains unresolved as a matter of common law, although criminal statutes, including the Canadian Criminal Code, resolve the problem in some cases by requiring the confiscation of the proceeds of certain crimes when the possessor has been convicted.

A more general, common law, principle was enunciated in Baird v. Queen in Right of British Columbia (1992), 77 C.C.C. (3d) 365 (B.C.C.A.), where the court had no such statute to rely on because there was no conviction. A search of Baird's hotel room revealed some $16,000 in cash and travellers' cheques which were identified as part of the proceeds of a robbery, and which Baird admitted were so. For reasons that do not concern us Baird was not prosecuted, and nor did the robbery victim want the money back. Baird thus applied for the return of the money from the crown. His lawyer relied on Bird, and argued that Baird "is entitled to retain possession against anyone, save the person from whom he may have wrongfully trespassed in acquiring them and save any person who can prove a superior title". The court distinguished Bird "as a kind of finders keepers case where there was not that degree of criminality or culpable immorality necessary to support" a claim that illegality should be a bar to recovery. It said that despite the lack of a conviction, "the conduct of Mr Baird giving rise to his claim is so tainted with criminality or culpable immorality that as a matter of public policy the court should not assist him to recover".

Did the court find a valid ground for distinguishing Bird from Baird? Is not a case like Armory also one in which the finder knew the property was not his? In Baird the crown had the money in its possession, and made a claim for bona vacantia - literally "vacant goods", and a doctrine that holds that unclaimed property belongs ultimately to the crown. What if Baird had somehow got possession of the money again, and the court would thus not have been asked to "assist him to recover"? What if a third party, not the true owner, and not the original "finder", had had possession?

The English Court of Appeal appears to have taken the opposite approach to the Baird court in Webb v. Chief Constable of Merseyside Police, [2000] Q.B. 427 (C.A.), and in doing so to have cast doubt on aspects of Parker. Webb had been in possession of money

that the police believed was the proceeds of drug trafficking, but he was not convicted. Conviction would have triggered confiscation of the money, but in its absence the police claimed that they could keep it if they could establish, on the civil standard, that it was the proceeds of crime. The court disagreed, holding that a conviction was required and that "[t]he illegality of the means of acquisition of the money gave rise to no public policy defence to the claimants' claim". It continued: "if goods are in the possession of a person, on the face of it he has the right to that possession. His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession".

A distinction between Baird and Webb is that in the latter case the claimant did not admit to having acquired the property illegally. But Webb seems to enunciate a broader principle, and was read that way in Costelo v. Chief Constable of Derbyshire Constabulary, [2001] 1 W.L.R. 1437 (C.A.). Costelo was found in a stolen car, and it was established that he knew it was stolen. However, another man, also in the car at the time, was convicted of the theft, and the true owner was never traced. The court applied Webb, concluding that it stood for the proposition that at common law "possession means the same thing and is entitled to the same legal protection, whether or not it has been obtained lawfully or by theft or by other unlawful means".

A recent case which clearly involved a "tinge" of illegality is Thomas v. Attorney-General of Canada (2006), 64 Alta. L.R. (4th) 184 (Q.B.). Burton Thomas of Edmonton went one day to his rented Post Office box and discovered in it a Canada Post Express envelope containing $18,000 in cash in 18 separate envelopes. He had opened it without looking at the addressee, and when he then did so he found that it was addressed to another Post Office box. He took the money to the police. To cut a long story short, the named recipient denied any knowledge of where the money had come from or why it had been sent to him, and the sender could not be located. Canada Post made no claim.

The attorney-general argued that the government should keep the money, but the court rejected that. While the money may well have been the proceeds of crime, Thomas had committed no offence. And "even if [his] actions [in opening the envelope] could be viewed as wrong ... this should not disentitle him." Trussler J. acknowledged that "the case law is not clear about the effect of acquiring possession of an item by a wrongdoing," he was "inclined to follow" Bird. He cited Baird, but for the proposition that any wrongdoing in the current case "was inadvertent and not tainted by a high level of criminality." The crown's final argument was that public policy should operate to deny Thomas, in that "members of the public should be prevented from making claims on other peoples' mail and it is important to encourage due care of recipients when opening the mail." Trussler J. accepted that these were valid concerns, but they were "not pressing and substantial enough to disentitle Thomas."

(E) ADVERSE POSSESSION OF LAND: INTRODUCTION

As we will see in a subsequent chapter, the common law maintains the fiction that the ultimate ownership of all real property lies in the Crown, and no individual can "own" land. Instead, individuals have "title"to land. Nowadays title is invariably asserted through a document - a conveyance or a will. But historically possession was a very significant part of the law of title. First, in and of itself it provided a method of acquiring title to unoccupied lands. At common law factual possession, including possession which has no obvious rightful origin, gave a title to the possessor. Second, possession also provided a method of proving title against other claimants, of reinforcing title. In the medieval period possession was called seisin, and seisin was "fact not right". It "expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership": Gray, Elements of Land Law, p. 53. Possession, it is often said, was the root of title.

This initial description of title at common law would not be complete without also noting an important corollary of it - that title to land at common law is relative, just as we saw that it is with personal property, in the finders section. Title to land also cannot be absolute because the Crown owns all land, and therefore it was, and is, pointless to ask a court to decide who owns the land. Instead, one asks the court - of the two disputants before you, who has the better title? This can be illustrated by a simple example:

A owned land and sold it to B, who never occupied it; C occupied the land as vacant land; C was then forcibly dispossessed by D.

B, C, and D all have a title, but some titles are better than others. B's is best because it is first. But C also has a title by possession, could sue D for recovery of the land, and if C did so the court would not inquire into whether there was somebody out there with a better title than C. B must take an action on his or her own account. C may have had no "right" to occupy the land, but "a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right": McNeil, Common Law Aboriginal Title, p. 15.

While it fulfills nothing like as important a role as it once did, possession remains important in the common law of title to real property. Conceptually in registry systems "modern conveyancing rests to some degree on the assumption that proof of continued de facto enjoyment of land by the vendor and his predecessors provides a good root of title for the purchaser": Gray, Elements of Land Law, p. 59. More importantly for current purposes, it remains possible to acquire title to land at common law, good against all the world, through long possession. But it can also be done through the law of adverse possession.

Briefly, since the requirements for adverse possession are what the rest of this chapter is about, adverse possession means that uninterrupted enjoyment of land of the correct nature over a period of time stipulated by law by a squatter (non-owner) deprives the

owner of his or her title and effectively gives to the squatter a title to the land, a title better than all others.

There are therefore two principal aspects of adverse possession law. The first is that of time. All jurisdictions in which it is possible to obtain title by adverse possession provide a statutory period during which a person claiming a title to land must act to recover the land from a wrongful possessor. That is why the rules relating to adverse possession are in the Real Property Limitations Act, which came into force in 2004. (It replaced Part 1 of the old Limitations Act, which is the statute referred to in the cases, but did not alter any of the provisions.) A claim of title by adverse possession is thus a defence to an action by someone with "paper title." Not all jurisdictions have the same time period. The following provisions tell you, inter alia, what the time period is in Ontario, and what "starts the clock running":

4) No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

5) (1) Where the person claiming such land or rent, or some person through whom that person claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits or rent were so received.

5) (9) Where the person claiming such land or rent, or the person through whom that person claims, has become entitled by reason of any forfeiture or breach of condition, such right shall be deemed to have first accrued when the forfeiture was incurred or the condition broken.

13) Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land, or in the receipt of the rent, such possession or receipt of or by the person by whom the acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and the right of the last-mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given.

15) At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action the right and title of such person to the land or rent, for the recovery whereof such entry distress or action, respectively, might have been made or brought within such period, is extinguished.

16) Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

36) If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of minority, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him or her, even if the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

Note that while possession by the adverse possessor must be continuous for the period of time, this does not mean that the same person must possess the land for all of that time. Provided there is no gap in possession, the rights acquired by the potential adverse possessor, the "inchoate possessory title," can pass from one person to another so that at the expiry of the limitation period "the last successor being then in possession will acquire a title in fee simple good against all the world including the true owner": per Bowen C.J. in Mulcahy v. Curramore Ply. Ltd. [1974] 2 N.S.W.L.R. 464 (C.A.). See also McRuer C.J.H.C. in Fleet v. Silverstein (1963), 36 D.L.R. (2d) 305 (Ont. H.C.): "[T]here is abundance of authority that is binding on me that where there has been adverse possession by 'A' as against 'B' which is surrendered to 'C' and 'C' immediately enters into possession of a right which has been handed over to him by 'A' the Statute of Limitations continues to run against the true owner".

The converse to this is also well established: that is, that if a squatter abandons the land before the expiry of the limitation period the title holder "regains" full rights. He or she does not have to bring an action for recovery (there being no one in possession against whom to bring such action), nor will a later adverse possessor get the advantage of the previous possession unless his or her entry was substantially continuous with the previous squatter's departure: see The Trustees, Executors and Agency Co. Ltd. v. Short (1888), 13 App. Cas. 793 (P.C. - N.S.W.).

You might think about how these points help to illustrate the introductory comments above about possession being the root of title and about the relativity of title. The "trespasser" who has not stayed the correct amount of time has still acquired something,

even if it is not a title that can be passed on other than by the successor immediately possessing the land.

The existence, and indeed the value, of an "inchoate possessory title" is illustrated by Perry v. Clissold, [1907] A.C. 73 (P.C - N.S.W.). Under New South Wales expropriation legislation the government issued a notice of expropriation to one Frederick Clissold in 1891. Nothing further was actually done with the land, although the legislation provided that publication of the notice was sufficient to convey all rights in the land to the government, and Clissold died in 1892. In 1902 Clissold's heirs demanded compensation, but the Minister refused when it turned out that Clissold had entered the land in 1881. Although he fenced it and treated it as his own, and likely had sufficient "quality of possession" to obtain full title, he clearly did not have sufficient "quantity of possession" under the applicable statute. The case went to the Privy Council on the narrow question of whether a prima facie case for compensation was disclosed on the facts, and the court held that it was. "It cannot be disputed", Lord MacNaghten said, "that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner". The expropriation legislation provided for compensation "to every person deprived of the land" and "it could hardly have been intended ... that the Act should have the effect of shaking titles which ... would in process of time have become absolute ... or that ... Ministers ... should take advantage of the infirmity of anybody's title in order to acquire his land for nothing".

The following extract canvasses and critiques the arguments usually made for why we have adverse possession.

T. W. Merrill, "Property Rules, Liability Rules, and Adverse Possession" (1985) 79 Northwestern University Law Review 1122

The first justification is one that is commonly invoked in support of statutes of limitations generally - the difficulty of proving stale claims. As time passes, witnesses die, memories fade, and evidence gets lost or destroyed. The statute of limitations recognizes this problem by adopting a conclusive presumption against attempting to prove claims after a certain period of time has elapsed.

The concern about lost evidence is common-sensical. As the quality and quantity of evidentiary material deteriorates over time, the process of fact-gathering and proof becomes more difficult. Surrogate witnesses and documents generally are not as accessible or as reliable as originals; consequently, more resources must be expended in finding them and corroborating their veracity. A rule requiring prompt resolution of claims is thus efficient in that it helps to minimize the costs of litigation and trial. There is also a fairness concern underlying the lost evidence rationale. Requiring that disputes be resolved promptly prevents the plaintiff from unfairly surprising the defendant with a claim that may be difficult or impossible to refute because evidence that would allow the defendant to defeat the claim no longer exists.

F) ADVERSE POSSESSION: THE "QUALITY" OF POSSESSION

The next three sections explore what "quality" of possession is needed to establish an adverse possession claim. Generally, to make out the defense of adverse possession the squatter must show not only that he or she has been in continuous possession of the land for the requisite period of time, but also that the possession had been "actual possession" in the manner of an ordinary owner. "Actual possession," the first part of the test in the first case, Re St Clair Beach, is usually broken down into a number of discrete but related elements: actual, continuous, exclusive, peaceful, adverse (without permission of the other or acknowledgment of the owner's title, and open or notorious). The word actual appears twice here - as the general requirement and as one of the specific elements of that requirement. When used in the latter instance it means "acts of possession" - did the trespasser do the kinds of acts on the land that an ordinary owner would do. It is like factum in personal property, and like factum is contextual.

Although the court does not come to a conclusion on the matter, it is likely that, if the title holder had gone out of possession, the MacDonalds would have been held to have sufficient "acts of possession." What arguments would you make that the McDonalds did physically possess the land as an ordinary owner would do?

The court finds that the defence cannot succeed because the McDonalds did not have exclusive possession. Why not? And what does this tell you about what the owner needs to do to remain in possession?

Even if the McDonalds had been in possession in a physical sense, and even if the title holders had discontinued possession, the McDonalds would probably still not have won. Why not? See s. 13 of the Act.

One final point of introduction is necessary here. It was stated above that adverse possession doctrine serves as a defence, specifically as a defence to an action by a title owner to recover land occupied by a squatter. However, in Re St Clair Beach the claim for possessory title is made affirmatively. In fact, there are many cases in which an affirmative claim is brought by a squatter, and even though there is very little direct authority on the point it is reasonable to say that there is no procedural difficulty in doing so. In any event, the affirmative claim is made in this case as a direct result of the operation of the land titles system. A few explanatory sentences on systems of recording title are therefore necessary here.

There are two such systems in common law Canada. Briefly, the registry system permits registration of all documents pertaining to land in the local registry office, but it does not require registration nor does it guarantee title. Prospective purchasers must therefore "search" the title by checking all the documents registered against a particular piece of land. By registering an owner protects title against all unregistered documents but not against unwritten unregistered claims such as title acquired by adverse possession. This system was historically in effect in the Maritime Provinces, southern Ontario (generally), and parts of Manitoba. It is being converted, with the aid of computerisation, into a Land

Titles system in many places.

In the other system, known as Land Titles or the Torrens system, the government guarantees title as shown on the record. When title to a particular piece of land is first recorded all outstanding interests in it are investigated and a certificate of title is issued. An insurance fund provides compensation for official errors. There is no need to search title in a Land Titles system: one merely obtains the official certificate of title. Land Titles is used exclusively in British Columbia, Alberta and Saskatchewan, in parts of Manitoba and in northern Ontario.

Many areas of the country that at one time used only the registry system now have both systems, with owners having an option. And this is the context for Re St Clair Beach. As stated in the opening paragraph, St Clair Beach Estates Limited applied for "first registration" under the Land Titles Act. The McDonalds objected, arguing that as a result of their long possession they, and not St Clair Beach Estates Limited, owned the disputed parcel.

NOTES

1) The judgment in Lundrigans states that not only did the trial judge hold that the squatters had the right quality of possession, he also gave them title to "a considerably larger parcel of land" than just the cabin. This was incorrect. An adverse possessor will normally gain title only to the land occupied, not to other land covered by the real owner's title.

However, if a person enters land under a defective title (a title deed that wrongly shows the trespasser to ow the land), and adversely possesses only part of the land for the requisite period, he or she will be considered to have been in constructive possession of the whole. This is called the doctrine of colour of title. See Wood v. Leblanc (1904), 34 S.C.R. 627 per Davies J. at 644: "the possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is that part occupation." The doctrine effectively recognises there are two types of trespassers - those who know they are trespassing and those who do not. We will return to that distinction in the following section on inconsistent use.

2) Had the adverse possessors won in Lundrigan's, they would probably not have been able to get to their land without trespassing. The successful adverse possessor acquires only the land itself and not any rights appurtenant to it. The leading case is Wilkes v. Greenway (1890), 6 T.L.R. 449 (C.A.). Greenway had acquired land previously belonging to Wilkes by adverse possession, but needed to use a private road belonging to Wilkes in order to reach that land. He argued that he had also acquired an easement of necessity consisting of a right of way via the road. (We will deal with easements in a later chapter). The Court rejected Greenway's argument, noting that "there is nothing in the Statute of Limitations to create ways of necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot impart into such negative provisions doctrines of implication [of easements of necessity]".

G) ADVERSE POSSESSION AND THE INCONSISTENT USE TEST: JUDICIAL REPEAL?

In recent years a series of cases, in England and Canada, have appeared to restrict the ambit of adverse possession doctrine by giving a new meaning to what makes possession "adverse". The traditional position can be summarised simply as a restatement of the principles outlined above: exclusive possession as an ordinary owner would possess for the statutory period of time is adverse to the title holder. Or, as it was put in Treloar v. Nute [1976] 1 W.L.R. 1295 (C.A.), "if a squatter takes possession of land belonging to another and remains in possession for ... [the statutory period] to the exclusion of the owner that represents adverse possession".

The new approach of requiring that the squatter's use be "inconsistent" with that of the title holder is illustrated by Masidon Investments, one of a series of cases from the 1970s and 1980s in which the Ontario Court of Appeal effectively made it extremely difficult for adverse possessors to win.

MASIDON INVESTMENTS V. HAM (1984), 45 O.R. (2d) 563 (C.A.)

The judgment of the court was delivered by Blair J.A.: This appeal concerns a claim for possessory title to land. Specifically, the issues are whether the use made of the land by the appellant, the trespasser, was inconsistent with the use of the respondents, the legal owners, and whether the appellant had the required animus possidendi, the intention to exclude the respondents from possession. The Honourable Mr. Justice Carruthers rejected the appellant's claim and this appeal is taken from his decision....

The relevant facts, as found by Carruthers J. in his full and careful discussion of the evidence, can be briefly set out. The appellant, in 1956, became the tenant of an approximate 100-acre parcel of land owned by Louis Mayzel, located on the north side of the Queen Elizabeth Highway near Oakville. The land was mortgaged by Mayzel to a mortgagee who was a trustee for a group of investors consisting of the respondents or their predecessors in title. On September 26, 1967, the mortgagee registered a final order of foreclosure against the parcel. As a result of subsequent negotiations between the mortgagee and Mayzel, title to the west half of the 100-acre parcel was conveyed to a company controlled by Mayzel. Title to the east half, the lands in dispute in this appeal, remained in the mortgagee and in 1968 was conveyed to the respondents. The appellant continued as a tenant of Mayzel. The residence he occupied throughout is located on the west half but most of the other farm buildings and the access road leading to the residence are located on the disputed east half.

The appellant operated an airport consisting of two grass runways on the disputed property. The first runway was laid out in the late 1950s and early 1960s; the second runway was constructed between 1966 and 1972 and required extensive ditching, grading and the addition of dozens of large truckloads of fill. The appellant maintained the runways by regular cutting and the addition of fertilizer, loam and seed. A wind-sock,

NOTES

1) In Gorman v. Gorman [1998] O.J. No. 1471 (C.A.) the inconsistent use test prevented a spouse from establishing title by adverse possession to the other spouse's interest. The Gormans had married in 1948 and separated in 1971. The wife stayed in the house with the children, the husband visited from time to time. They never divorced and despite occasional negotiations never came to an agreement whereby one party would buy out the other. The husband did propose moving back in in 1986, but his wife "rebuffed him." In 1996 the husband, then living in a senior citizen's home, applied for an order to sell the house and the wife defended the action by arguing that his interest was extinguished by the Limitations Act. The trial judge found that she had had actual possession for over twenty years, and that she effectively excluded her husband from the use he wanted to make of the property, which was to live in it. However, she failed to establish that she had the intention to exclude the husband from possession; as evidence of that the trial judge cited the various communications between the two over the years over selling the house or her buying him out. Those communications showed that she accepted that he had an interest in the house, and thus she was not intending to exclude him. The wife appealed on the question of whether such an intention needed to be proved, and the Court of Appeal held that it did in cases other than mistake cases.

2) One might wonder whether an adverse possessor can ever meet the inconsistent use test. Occasionally they have succeeded, but always in unusual circumstances. In Keil v. 762098 Ontario Inc et al (1992), 91 D.L.R. (4th) 752 (Ont. C.A.) one party bought a lot of residential land and applied for a severance of part of it, for development purposes. In litigation over this severance it turned out that a neighbour was using part of the lot as a driveway, and had done so for over 20 years before the title owner bought the land. The Court of Appeal agreed with the title holder's argument that recent cases, especially Masidon Investments, had made it necessary "to demonstrate that use of the land by the occupant in possession is inconsistent with the form of use and enjoyment that the titled owner intended to make of it". The court summarised the title owner's argument thus: "the intended use was ... retention of the land in its present form until eventual development as a separate residential parcel. This use ... is not interfered with by the laying of gravel and the passage of vehicles". But the court also stressed that the owner's intention must relate to the time during which the limitation period was running. In this case the title owner had no intention when the period was running, because it did not own the land then. It was the prior owner's intention that mattered, and no evidence had been led on that.

Does this mean that the inconsistent use test actually helps adverse possessors when the title changes hands?

Another rare case of success for the adverse possessor is Georgco Diversified Inc. v. Lakeburn Land Capital Corp. (1993), 31 R.P.R. (2d) 185 (Ont. G.-D.) the plaintiff Georgco owned five contiguous plots of land on Hayden Street in Toronto, a street parallel to and south of Bloor Street East. The defendant Lakeburn owned land

immediately to the north, on Bloor. Since 1953 the plaintiff and its predecessors in title had effectively occupied a strip 81 feet long and between two and a half and four and a half feet wide which according to registered surveys belonged to the defendant and its predecessors in title. Counsel for the defendant conceded that "the disputed lands have for a period of more than ten years been occupied by the plaintiffs and incorporated as part of the backyards of the plaintiffs' houses, have been landscaped as part of such backyards, and appear to have been boarded by fences". The trial judge held that the plaintiffs had had actual possession. Counsel for the defendant relied on Masidon Investments, arguing that "in order to establish that the claimant to adverse possession has effectively excluded the true owner from possession, the use by the claimant must be inconsistent with the intended use of the property by the true owner" and that "if the true owner had no intended use of the disputed land, the claimant cannot satisfy the test of effective exclusion". Ground J. (really!) accepted that Masidon Investments was the case to be followed, and said this about the owner's intended use: "The evidence before this court would seem to indicate that, if [the defendant] ... had any intention at all with respect to the disputed lands, its intention as to use, at the highest, would be that no one should make use of the lands".

Given this conclusion, and assuming that “no one” included the owner, the plaintiff had established adverse possession because by any use of the land by anybody would be inconsistent with the intention that nobody use the land.

A recent case of a successful claimant is Corporation of the Township of Lake of Bays v. 456758 Ontario Ltd (2006) O.A.C. 85 (C.A.). From the 1940s the municipality had used land as a public park. In 1990 the president of the defendant corporation asserted ownership of the land which led to a verbal dispute with the municipality’s officers, the latter denying the company’s claim. Shortly thereafter the township erected a fence to keep the company out. The Court of Appeal found that the Masidon test had been met - the owner had been effectively excluded and the fence erected with the intention of excluding it.

3) There is language in Masidon Investments deprecating the fact that Ham deliberately tried to get the land via adverse possession. Is it appropriate to introduce notions of “fault” into this area of the law? In Lehal v. Murray (2001), 48 R.P.R. (3d) 304 (Ont. S.C.) Van Melle J., having found that the possessors’ predecessor in title did not have exclusive possession and that therefore there had not been ten years of possession of the requisite quality, went on to say that the claimants would not have been entitled even if they had been there ten years. The judge’s reasons on this point rely heavily on the fact that the Murrays knew it was not their land, but they nonetheless used it. This fact “disturbed” the judge, who believed that “once the Murrays understood the concept of adverse possession”, they set out to establish it and to enlarge their claim. The judge said: “Adverse possession is not a mechanism whereby someone can convert to his or her own use property belonging to his or her neighbour. This is not a case of mutual mistake or inadvertence. There is a course of conduct by the Defendant and her husband apparently designed to appropriate property belonging to someone else.... [Their actions were]

entirely consistent with a course of conduct designed to 'take over' someone else's property, but not consistent with a legitimate claim for adverse possession". An appeal to the Court of Appeal was dismissed, although without reference to these issues: (2002), 5 R.P.R. (4th) 34 (Ont. C.A.).

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(H) RETREAT FROM THE INCONSISTENT USE TEST

The biggest problem with the inconsistent use test is revealed by thinking about the discussion of intention in Beaudoin, a case decided before Masidon Investments. In Beaudoin the court held that the adverse possessor could not be required to intend to exclude the true owner specifically, since he mistakenly believed that he was the owner. It is similarly true that the possessor cannot effectively exclude the owner if the parties are mistaken about title, because the true owner cannot have a use for the land if he or she does not believe that he or she is the owner.

BUCKINGHAMSHIRE COUNTY COUNCIL V. MORAN [1989] 2 ALL ER 225 C.A.

Facts in brief:

In 1955 the plaintiff council acquired a plot of land with the intention of using it for a road diversion in the future. The piece of land was adjacent to the garden of the defendant's predecessor in title who maintained the plot as if it were part of his own land. In 1971, the defendant purchased the house on the neighbouring property and continued to treat the land in question as his own although he knew it belonged to the county council. In 1975 the council wrote to the defendant and asked him to explain on what grounds he was exercising rights over the plot. The defendant replied that he understood that he was allowed to use th land until the proposed road diversion was built. The council refuted this right but made no attempt to assert physical ownership until 1985 when it issued a writ claiming possession of the property. At trial, the judge upheld the defendant's claim of adverse possession and the plaintiff council appealed.

SLADE LJ.

Section 15(1) of the 1980 Act provides:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

… As is stated in s 15(6), Pt I of Sch 1 o the 1980 Act…

> Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

… The origin of the suggested 'special rule' is said to be the often-cited statement of Bramwell LJ in Leigh v Jack 5 Ex D 264 at 273:

> … in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he

MUTUAL MISTAKE OR UNILATERAL MISTAKE?

Teis clearly stands for the proposition that the inconsistent use test does not apply in cases of mutual mistake. Yet its underlying policy reasoning suggests that what matters is the honest mistake of the trespasser, not the fact that both parties were mistaken. Laskin J.A. stated: "The law should protect good faith reliance on boundary errors or at least the settled expectations of innocent adverse possessors who have acted on the assumption that their occupation will not be disturbed. Conversely, the law has always been less generous when a knowing trespasser seeks its aid to dispossess the rightful owner.... The test of inconsistent use furthers this policy by strengthening the hand of the true owner in the face of an adverse possession claim by a knowing trespasser. Applying the test to claims by persons who honestly, though mistakenly, use land not their own, defeats this policy."

There have been a few reported cases involving unilteral mistake on the part of the trespasser, but as yet no clear statement from the courts that inconsistent use does not apply in such circumstances. In Bradford Investments 1963 Ltd v. Fama , (2005), 77 O.R. (3rd) 127 (S.C.) Cullity J made it clear that he did not agree with the use of the inconstant use test at all, and he noted that recent English decisions had "thoroughly rejected" the test because it "tends to revive the concept of adverse possession that was thought to be abolished by the English legislation of 1833." But he was bound by the Court of Appeal's adoption of the doctrine. Rather than directly fashion a further exception for unilateral mistake, he argued that the Court of Appeal cases were inconsistent, that whereas Masidon applied the inconsistent use test to the issue of effective exclusion, earlier cases (Keefer and Fletcher cited in Masidon) had referred it to the trespassers intention to exclude the true owner. If that was the case, he argued, then "the absence of an inconsistent use would appear to do no more than give rise to a strong presumption that there was no intention to exclude the owner." And in cases of unilateral mistake that presumption could be overturned: "I see no difficulty in inferring that persons - such as the defendants - who believe that they are the owners of property, and exercise all the possessory rights of owners over it, intend to exclude all uses of the property by any other person who may claim to be entitled to such user by reason of a claim to ownership." He thus enunciated the following three-part test which in effect meant that a trespasser who was mistaken could "pass" the inconsistent use test:

I do not believe I am compelled by the decision in Masidon to find that Bradford was not excluded from possession in this case where:

(1) the disputed lands adjoined, and were not physically separated from, residential properties purchased by the defendants;

(2) the defendants enclosed the disputed lands and exercised the full possessory rights of owners of them for the statutory period under a bona fide belief that they owned them and, in consequence, with the intention to exclude the whole world; and

(3) the owner of the disputed lands made no claim to them during the period and had no

recovery at law, it might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.

Or again, a Legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protection of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a Legislature concluded (as at least one court has held, New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107) that under certain circumstances news-gathering is a business affected with a public interest; it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for insuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

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NOTES

(from Jim Phillips, *Property Law: 2008-2009*)

1) In Pittsburgh Athletic Co. et al v. KQV Broadcasting Co. 24 F. Supp. 490 (U.S. Dist. Ct., Penn, 1938) the Pittsburgh Pirates obtained an injunction to prevent the defendants from making unauthorized broadcasts of their games from nearby leased premises which overlooked the stadium. The Pirates had given exclusive broadcasting rights to two other radio stations, rights which Schoonmaker J. described as property. He said at p. 492 that KQV's action: "amounts to unfair competition and is a violation of the property rights of the plaintiffs. For it is our opinion that the Pittsburgh Athletic Company by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news and the right to control the use thereof for a reasonable time following the games."

2) In Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Exch. 382 the defendant cable company intercepted C.B.C. transmissions of Montreal Alouette games and broadcast them to its subscribers. The court held that "no matter how piratical, the taking by one person of the work of another may be, such taking cannot be an infringement of the rights of the latter unless copyright exists in the work." It then held that such copyright did exist under the provisions of the Copyright Act.

3) One commentator, while noting that the misappropriation doctrine enunciated in INS v. AP has had limited application, nonetheless approves of this decision as one dealing with "certain types of services of a fragile character, rather than products, whose commercial exploitation without destruction by immediate imitation is difficult": J.A. Rahl, "The Right to 'Appropriate' Trade Values" (1962) 23 Ohio State L. J. 56 at 57. Rahl argues that the misappropriation doctrine should not be employed against competition generally, but only against competition "where the result would be to destroy either the value created by plaintiff or the market for it". That is, "the protection ...[should] safeguard the plaintiff's opportunity to market his trade value" at all; it should not protect opportunities to increase profitability. He states: "the court's protection ... [should be] reserved for situations in which defendant's conduct threatens to destroy the opportunity to market the trade value, the prospect of which has induced plaintiff to bring it forth" (p. 63).

4) In two cases involving the Boston Marathon the Boston Athletic Association (BAA) sought to invoke the misappropriation principle. Boston Athletic Association v. Sullivan 867 F.2d 22 (lst Cir. 1989) concerned a company selling t-shirts with "Boston Marathon" written on them. The BAA was successful in enjoining this. In WCVB-TV v. Boston Athletic Association 926 F.2d 42 (lst Cir. 1991) the BAA had sold "exclusive" TV rights to one local TV station, but another one planned to broadcast the marathon simply by setting up cameras on the streets. The BAA failed in an attempt to obtain an injunction to prevent this. In the course of its decision the court stated:

> As a general matter, the law sometimes protects investors from the 'free riding' of others; and sometimes it does not. The law, for example, gives inventors a 'property right' in certain inventions for a limited period of time; ... it provides copyright protection for authors; ... it offers certain protections to trade secrets.... But, the man who clears a swamp, the developer of a neighbourhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge. Just how, when and where the law should protect investments in 'intangible' benefits or goods is a matter that legislators typically debate, embodying the results in specific statutes, or that common law courts, carefully weighing relevant competing interests, gradually work out over time". [emphasis in original]

What distinguishes the two Boston Marathon cases? What distinguishes the latter Boston Marathon case from the case cited above involving the Pittsburgh Pirates?

5) Two recent applications of INS v. AP are National Basketball Association v. Motorola Inc 105 F. 3d 841 (2nd Cir. 1997), and Morris Communications Corp v. PGA Tour, Inc. 235 F. Supp. 2d 1269 (M.D. Fla 2002); affd. 70 U.S.P.Q.2d 1446 (C.A.). In the former case Motorola produced a hand-held pager device that provided real-time scores of NBA games, as well as an on-line service provider which did the same thing. Motorola took the information from radio and TV broadcasts. Among other claims the NBA said that this was misappropriation.

The U.S. Court of Appeals for the Second Circuit dismissed the claim, and its decision is complicated for our purposes by the US Copyright Act of 1976. This Act, in line with general copyright principles, effectively made such information not copyrightable. More importantly, it also pre-empts many claims for the legal protection of information through other legal causes of action. There are exemptions to pre-emption, and in this case the court held that only a narrow exception existed - the so-called "hot news" claim. For a "hot news" claim to succeed in a misappropriation suit five elements must be present: (i) the plaintiff must incur some cost in generating the information; (ii) the value of the information must be very 'time-sensitive'; (iii) the defendant must be 'free-riding'; (iv) the defendant must use the information in direct competition with the plaintiff; and (v) there must be a substantial threat to the financial viability of the plaintiff's production of the information. The court held that while some of these elements were made out, not all were: The information was time-sensitive, and the NBA had a product, which it was expanding, which competed. But the NBA's primary business was putting on the games and transmitting live broadcasts of them, and thus Motorola was only competing with a part of the league's business, the transmission of factual information. And it was not free-riding on that - it did not get its information from the NBA's own real-time news service. Motorola expended its own resources on gathering the information which it then transmitted to subscribers.

In the PGA Tour case a news service was not permitted to have employees attend PGA tournaments unless they agreed not to transmit over the internet real time golf scores obtained from the media centre, such information being collected from all 18 holes by the PGA's own system. Morris Communications said this was tantamount to exercising a property right over the information, and that according to the Motorla case it should be allowed to disseminate the information it picked up in the media centre. The court found for the PGA, distinguishing Motorola on, inter alia, the ground that the PGA was within its rights to deny access to the course unless the observer agreed not to disseminate the information.

NOTES

(from Jim Phillips, *Property Law: 2008-2009*)

1) For a comment on the Stewart case which discusses also the other cases we have looked at, see A. Weinrib, "Information and Property", (1988) 38 University of Toronto Law Journal 117. See also D. Doherty, "When is a Thief Not a Thief? When he Steals the Candy but Leaves the Wrapper", (1988) 63 C.R. (3d) 322. Both authors disagree with the Supreme Court's ruling. Doherty writes that the result "seems ludicrous" because criminal liability is made to depend "on whether [Stewart] ... took the package (a worthless item) along with the contents (a valuable item)". He further argues that "a consideration of the language of s.283 of the Criminal Code ..., along with the applicable policy considerations, yields the conclusion dictated by common sense: Mr. Stewart should have been convicted".

2) In American Heart Association at al v. County of Greenville, 331 S.C. 498, the plaintiffs, the beneficiaries under the will of one Katie Jackson, argued that she, and ultimately they as well, owned the original will of (Shoeless) Joe Jackson. They wanted it, of course, because his signature was worth a lot on the collectables market; in his case the value was enhanced by the fact that a Jackson signature was extremely rare. The plaintiff's argument was based on the fact that before death a person clearly owned his or her will and could do whatever he or she wanted with it. The Supreme Court of South Carolina rejected the claim, on the grounds that state law required the will to be filed with the Probate Court by the executor, and that as a result it became a public record and thus the property of the state.

consideration in arriving at the amount of $30,000, which she considered an appropriate amount to reflect the respondent's contribution to the obtaining of the appellant's dental licence, and awarded that amount in a lump sum. I see no reason to disturb that decision.

Cross-Appeal

34 The respondent argues in her cross-appeal that, given the trial judge's finding that the licence constituted property within the terms of the F.L.A., the full value of the licence should have been included in net family assets for the purpose of determining the equalization payment. I think that result logically follows. However, given the trial judge's reasons as a whole, had she proceeded in that manner, it would have been appropriate to then order an unequal distribution pursuant to s. 5(6) of the F.L.A., and the result would have been the same.

Disposition

35 I would not interfere with any other provisions of the trial judgment. In result, I would dismiss the appeal and the cross-appeal, with costs to the respondent in the appeal and no costs in the cross-appeal.

Appeal and cross-appeal dismissed.

NOTES
(from Jim Phillips, *Property Law: 2008-2009*)

1) Despite its conclusion on whether the licence was property, the court in Caratun employed the support provisions of the federal Divorce Act to award Mrs Caratun a lump sum payment of $30,000. This decision was refused leave to appeal by the Supreme Court of Canada: (1993), 46 R.F.L. (3d) 314 (S.C.C.).

2) Most Canadian decisions, and commentators, have come to the same conclusion as the Ontario Court of Appeal on this issue. For a review see N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Other Career Assets: Towards Compensatory Support", (1989) 8 Canadian Journal of Family Law 23.

3) A dental practice is considered to be property for the purposes of the FLA in Ontario, and its value is usually calculated as assets plus goodwill minus liabilities. Is this inconsistent with the holding in Caratun? Pension entitlements, which will be paid in the future, are also considered to be property; is that inconsistent?

CHAPTER SEVEN:

INTRODUCTION TO THE COMMON LAW OF REAL PROPERTY

THE DOCTRINES OF TENURE AND ESTATES

(This chapter taken from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION TO TENURE AND ESTATES

Although much of the system of tenure explained below is obsolete, a basic understanding of the historical origins of the English law of real property is indispensable to an understanding of the conceptual bases of that law in common law Canada. As in England, land "owners" in Canada are still not true owners, but are tenants in fee simple of the crown.

K. Gray, Elements of Land Law

It is not easy to imagine, *tabula rasa*, how best to construct a coherent and systematic body of rules governing rights in and over land. During the course of eight centuries, English law has developed a framework of rules which functions today with admirable success, but it is far from obvious that, if the task of construction were begun again, the end result would necessarily resemble the law of real property in its present form. The conceptual points of departure which lie at the back of the law of real property contain little, if anything, of a particularly compelling or a priori nature. There is indeed nothing inevitable about the eventual shape of modern land law, but it remains true that the law of today is still heavily impressed with the form of ancient legal and intellectual constructs .... From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the inter-relation of these concepts is not unlike a form of mathematical calculus. The intellectual constructs of land law move, as Professor Lawson once said, ' in a world of pure ideas from which everything physical or material is entirely excluded'. The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions which 'seem to move among themselves according to the rules of a game which exists for its own purposes.' It is from this interplay of naked concepts that the creature of modem land law ultimately derives. English law cannot be properly understood except in the light of its history, and it is in the doctrines relating to tenures and estates that the historical roots of English land law are to be found.

The Doctrine of Tenures The origin of the medieval theory of English land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner of all land in England. Since the Normans brought with them no written law of land, they initiated in their newly conquered territory what was effectively a system of landholding in return for the performance of services. According to this feudal theory, all land was owned by the Crown and was granted to subjects of the Crown only upon the continued fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership, and the notion of absolute ownership other than in the Crown was therefore inconceivable. Pollock and Maitland were later to explain quite simply that all land in England 'must be held of the king of England, otherwise he would not be the king of all England'. In their view,

to have wished in medieval times for an ownership of land which was not subject to royal rights was 'to wish for the state of nature'.
It was a direct consequence of this theory that all occupiers of land were at best regarded as 'tenants', i.e. as holders of the land who in return for their respective grants rendered services of some specified kind either to the King himself or to some immediate overlord who, in his turn, owed services ultimately to the Crown. In this way there emerged a feudal pyramid, with the King at its apex and it was the doctrine of tenures which defined the terms of the grant on which each tenant enjoyed his occupation of 'his' land.

The feudal services rendered by 'tenants' were an integral part of early English land law, and in time became standardized and identifiable by the type of service exacted and performed. The different methods of landholding (differentiated according to the form of service required) were known as 'tenures', each tenure indicating the precise terms on which the land was held. The tenures were themselves subdivided into those tenures which were 'free' (and therefore formed part of the strict feudal framework) and those tenures which were 'unfree' (and appertained to tenants of lowly status who were ... effectively little better than slaves).

The common labourer or 'villein tenant' originally had no place on the feudal ladder at all. He merely occupied land on behalf of his lord, and it was the latter who was deemed by the common law to have 'seisin' of the land thus occupied. Villeinage (later called 'copyhold tenure'), although of an unfree nature, came in practice to enjoy increasing protection.

The kinds of service provided by those who enjoyed free tenure included, for instance, the provision of armed horsemen for battle (the tenure of 'knight's service') or the performance of some personal service such as the bearing of high office at the King's court (the tenure of 'grand sergeanty'). These tenures were known as 'tenures in chivalry', and were distinct from the 'spiritual tenures' of frankalmoign and divine service (by which ecclesiastical lands were held in return for the performance of some sacred office) and the somewhat humbler 'tenures in socage' (which obliged the tenant to render agricultural service to his lord). With the passage of time, the military and socage tenures were commuted for money payments, but all tenures carried with them 'incidents' (or privileges enjoyed by the lord) which were often more valuable than the services themselves.

The consequence of medieval theory was the emergence of a kind of feudal pyramid of free tenants, with the actual occupiers of the land (the 'tenants in demesne') forming the base, their overlords ('mesne lords') standing in the middle - both receiving services and rendering services in their turn - and with the King at the apex receiving services from his immediate tenants ('tenants in chief'). Pollock and Maitland described the system of tenures in terms of a series of 'feudal ladders', noting that 'theoretically there is no limit to the possible number of rungs, and ... men have enjoyed a large power, not merely of adding new rungs to the bottom of the ladder, but of inserting new rungs in the middle of it.' This process of potentially infinite extension of the feudal ladder was known as subinfeudation. However, subinfeudation carried the disadvantage that it tended to make the feudal ladder long and cumbersome, and in time the process of alienating land by substitution became more common. Under the latter device the alienee of land simply assumed the rung on the feudal ladder previously occupied by the alienor, and the creation of a new and inferior rung was no longer necessary.

By the end of the 13th century a more modern concept of land as freely alienable property was beginning to displace the restrictive feudal order, and this evolution culminated in the enactment of *Quia Emptores* in 1290. The *Statute Quia Emptores* constituted a pre-eminent expression of a new preference for freedom of alienability as a principle of public policy. The major innovation contained in the Statute was the prohibition for the future of alienation by subinfeudation. Following the enactment of 1290 only the Crown could grant new tenures, and the existing network of tenures could only contract with the passage of time. Every conveyance of land henceforth had the effect of substituting the grantee in the tenurial position formerly occupied by his grantor: no new relationship of lord and tenant was created by the transfer. It is the *Statute Quia Emptores* which - quite unnoticed - still regulates every conveyance of land in fee simple today. Every such conveyance is merely a process of substitution of the purchaser in the shoes of the vendor, and the effect of the Statute during the last seven centuries has tended towards a gradual levelling of the Feudal pyramid so that all tenants in fee simple today are presumed (in the absence of contrary evidence) to hold directly of the Crown as 'tenants in chief.

The dismantling of the old feudal order was later accelerated by more direct measures aimed at a reduction of the forms of tenure. Under the *Tenures Abolition Act 1660*, almost all free tenures were converted into 'free and common socage' or 'freehold tenure'. There is therefore only one surviving form of tenure today - freehold tenure in socage - but the conceptual vestiges of the doctrine of tenures live on. It is still true that every parcel of land in England and Wales is held of some lord - almost invariably the Crown. It is still technically the case that no one owns land except the Crown, and that all occupiers of land are merely - in the feudal sense tenants. However, for all practical purposes the doctrine of tenures is now obsolete. Tenure of land for an estate in fee simple is now tantamount to absolute ownership of the land - or as close to total control of land as is nowadays possible. The doctrine of tenures has long been overtaken in importance by that other doctrine which explains much of English land law - the 'doctrine of estates'.

The Doctrine of Estates Whereas the doctrine of tenures served within the framework of medieval theory to indicate the conditions on which a grant of land was held, the doctrine of estates defined the effective duration of that grant. The doctrine still plays a fundamental role today in the classification of interests in land law.

Since it was intrinsic to the structure of medieval land law that the only owner of land was the King, it followed that his subjects - be they ever so great - were merely 'tenants', occupying the land on the terms of some grant derived ultimately from the largesse of the Crown. It was not initially clear what (if anything at all) the individual tenant could say he 'owned' .... The answer to the conundrum was provided by the 'doctrine of estates'. As Professor F.H. Lawson pointed out, the solution arrived at in English law was 'to create an abstract entity called the estate in land and to interpose it between the tenant and the land.' The object of the ownership enjoyed by each 'tenant' was not the land itself but a conceptual 'estate' in the land, each 'estate' differing from the others in temporal extent. Thus by resorting to an ingenious compromise, English law resolved at a stroke the apparent contradiction of theory and reality in the ownership of land. Although at one level the 'estate' in the land merely demarcated the temporal extent of the grant to the 'tenant', in practice it provided a functional (and theoretically acceptable) substitute form of ownership in respect of land. The doctrine of estates survives to the present day. Like the medieval 'tenant', the modern proprietor of land owns in some strict sense not the land, but rather an 'estate' in the land which confers specific rights and powers according to the nature of the 'estate'.

The terminology of 'estates' introduced a fourth dimension of time into the description of the terms of grant enjoyed by the 'tenant'. Each 'estate' recognised by the common law simply represented a temporal 'slice' of the bundle of rights and powers exercisable in respect of land, and in the doctrine of estates there was developed a coherent set or rules classifying the diverse ways in which rights in land might be carved up in this dimension of time. It was the concentration on the rights and powers appurtenant to differing kinds of 'estate' which so sharply distinguished the common law view of real property from the continental emphasis on full ownership in the abstract sense (*dominium*). An 'estate' denoted the duration of a grant of land from a superior owner within the vertical power structure which emanated from the Crown; and no man could grant another any greater 'estate' than that which he himself owned (*nemo dat quod non habet*).

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B) TYPES OF ESTATES: K. Gray, Elements of Land Law

The freehold estates The three freehold 'estates' known to the common law were the fee simple, the fee tail and the life estate, and each must now be examined in turn .... The key to the distinctions between them lies in the notion of time. The essence of the doctrine of estates has never been more elegantly captured than in the argument presented before the Court of Exchequer in the 16th century in *Walsingham's Case*. Here it was said that: "the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time".

The estate in fee simple has always been the primary estate in land. It represents the amplest 'estate' which a 'tenant' can have in or over land. As was said in *Walsingham's Case*, 'he who has a fee-simple in land has a time in the land without end, or the land for time without end'. In so far as real property represents a 'bundle of rights' exercisable with respect to the land, 'the tenant of an unencumbered estate in fee simple has the largest possible bundle .... Although in theory each tenant in fee simple is still merely a tenant in chief of the Crown, the estate in fee simple is nowadays tantamount to absolute ownership of land. In terms of the feudal fiction, an estate in fee simple denotes a grant of land from the Crown in perpetuity - a right of tenure which endures for ever and which is capable, more or less indefinitely, of transfer inter vivos or of devolution on death. The owners of the fee simple estate may come and go but the estate remains, since it is of infinite duration. Each new owner steps into the shoes of his predecessor as a tenant in chief of the Crown - the modem effect of the *Statute Ouia Emptores* of 1290.

The owner of an estate in fee simple is sometimes called a 'freeholder' - the owner of a freehold estate. Although modern legislation often curtails the fee simple owner's rights of use and enjoyment (for environmental and planning purposes), there are relatively few limitations on his power to dispose of an estate in the land whether by will or by alienation inter vivos.

Note on Presumptions and Words of Limitation

An individual owning a fee simple estate can obviously choose, when divesting him or herself of it, to simply give the full fee simple estate to the grantee. Or he or she could choose to give some lesser estate, such as a life estate, to the grantee. And if the words used in the will or conveyance (deed) are clear as to what is being transferred, there will be no problem in determining what was intended.

But what if the terms of any instrument - an *inter vivos* deed (a transfer from a living person) or a will - leave uncertain what was intended? Because of the importance of land in the medieval world the common law required strict adherence to conveyancing formulae if a person wished to transfer *inter vivos* an estate in fee simple. The grant had to say: "to A and his heirs." Any other form of words - "to A in fee simple, to A forever, to A and his successors" - would create only a life estate.

Note that in the phrase "to A and his heirs" the words to "to A" are known technically as words of purchase, words that designate the person to whom the interest is granted. The words "and his heirs" are called words of limitation, words that designate the nature of the interest granted.

The strict common law rule on conveyancing has long been altered by statute. The *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, s. 5 states:

5 (1) In a conveyance, it is not necessary, in the limitation of an estate in fee simple, to use the word "heirs".

(2) For the purpose of such limitation, it is sufficient in a conveyance to use the words "in fee simple" or any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance passes all the estate, right, title, interest, claim and demand that the conveying parties have in, to, or on the property conveyed, or expressed or intended so to be, or that they have power to convey in, to, or on the same.

(4) Subsection (3) applies only if and as far as a contrary intention does not appear from the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section applies only to conveyances made after the 1st day of July, 1886.

NOTE. This statute was not passed in 1990. As the note says, this has long been the rule. Every so often provincial and federal statutes are consolidated and re-passed so that the original statute and all is amendments are in place. These are called 'Revised Statutes', hence RSO stands for Revised Statutes of Ontario.

The alienation of realty by will was treated differently at common law. Land was not devisable at all until the passage of the *Statute of Wills*, 1540, and thereafter the courts took a more lenient view of the need for correct words of limitation, a view based on the rule that wills are to be construed in an attempt to find the true intention of the testator or testatrix. A similar provision to the one cited above is now to be found in the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 26, which states:

26. Except where a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

(C) PRESENT AND FUTURE INTERESTS

The preceding pages demonstrate that the estates system recognizes a variety of different interests in land. The next sections will show that the common law also allows for conditional estates, interests in land which may either not arise until the happening of a certain event or which may be terminated in the future by the occurrence of a certain event. Once we know that it is possible to have an interest in land less than the fee simple absolute (life estate, fee tail, conditional fee simple), the next question is - what happens to the rest of the fee simple absolute, that is, the rest of the time, in any given piece of realty? The answer is that the law recognizes future interests in land, interests held by persons other than those in possession in the present.

Gray's *Elements of Land Law* puts it this way: "Through the doctrine of estates the common law was able to organise the allocation of certain powers of management, enjoyment and disposition over land in respect of particular periods or 'slices' of time. Moreover, as the law of real property became distanced from the physical reality of land and entered a world of almost mathematical abstraction, it was possible to accord an immediate conceptual reality to each 'slice' of time represented by an 'estate'. In other words, any particular 'slice' of entitlement in the land could be viewed as having a present existence, notwithstanding that its owner was not entitled to possession of the land until some future date. In a world of concepts it was quite easy to conceive of rights to successive holdings of the land as 'present estates coexisting at the same time'. It was ultimately this feature of the time-related aspect of the 'estate' in land which made it possible for the common lawyer to comprehend the notional reality of immediate dispositions of, and dealings with, future interests in land."

In fact, the common law recognizes two types of future interests: a reversion and a remainder.

A reversion is any interest retained by the grantor: for example, in the grant "to A for life" the grantor, assuming that he or she holds the fee simple absolute, has not disposed of his or her full interest. The grantor has a reversion in fee simple. A reversion does not need to be specified, it arises by operation of law from the failure by the grantor to alienate the entire interest.

A remainder is an interest created in a third party which follows the granting of an estate less than the fee simple absolute. For example, in the grant "to A for life, then to B", B has a remainder in fee simple but no right to possess the land until A dies. Note that in this example the grantor has no reversion -- he or she has given away the full fee simple.

Note that the above is a very cursory discussion of future interests. The area is a lot more complicated and technical than this, but given that this is an introductory course I do not think it necessary or useful to go into all of the details. Those who like to use Ziff's *Principles of Property Law* will find a good review of the area in chapter 7 of the fourth edition.

PROBLEMS

In answering these questions consider both what kind of estate a person has, and whether it is one of present or future possession.

1) A has a fee simple estate and executes a deed stating: "I give my land to B". What estate does B have, and why?

2) A has a fee simple estate and makes a will stating: "to B for life, and on the expiry of B's life to C for life". What interests do A, B and C have?

3) A has a fee simple estate and makes a will stating: "I give my land to B for the life of C, then to D for life, then to E. What interests do A, B, C, D and E have? What happens if B dies before C?

D) INTRODUCTION TO CONDITIONAL ESTATES

We have seen that estates in land are temporal 'slices' of the rights to the possession, use and enjoyment thereof. So far we have considered these estates as 'absolute', as belonging unconditionally to someone. Estates may, however, be granted subject to conditions. Conditions can be of two kinds.

Conditions Precedent. First, there can be conditions of eligibility, or what are known technically as conditions precedent. These must be satisfied before the grantee has any right of enjoyment at all. For example: 'to A at 21', or 'to B for life if she should marry Y'. Until A turns 21, or until B marries Y, they have only what are called *contingent* interests. If either die before the condition is met, or if the condition becomes impossible of performance (for example, if Y dies before B marries him) the interest will be extinguished and there is nothing that can pass to heirs. Conversely, if A becomes 21, or if B marries Y, then the condition is satisfied and the interest becomes a *vested* interest.

This does not mean that the owner of a vested interest has an immediate right to possession. That is the case in the two examples given above, but it is not so in the grant "to A for life, then to B for life if she reaches 21". At the time of the grant, assuming B is not 21, her interest is contingent. If she reaches 21 while A is still alive, her estate becomes *vested in interest*, but she has no right to possession until A dies.

It should be noted here that the common law generally favours early vesting where there is any doubt about whether a grantor or testator/testatrix intended to create a vested or contingent interest. *Mackay* v. *Nagle et al* (1988), 30 E.T.R. 191 (N.B.Q.B.) illustrates this point. The testator left his property to his wife for life "and thereafter to my living children in equal shares". His four children were alive when the will took effect, but one died during his widow's lifetime. Did the word "living" mean children alive at the time the will took effect, in which case the now-deceased child's interest would be vested and would descend to his heirs? Or did it mean living at the time the widow's life estate expired, in which case it would be a contingent interest, the condition precedent being surviving the widow? In coming to the conclusion that the interest was vested, the court considered extrinsic evidence of the testator's intention when the will was made. But it relied largely on a series of cases establishing the principle that, in ambiguous cases, "the courts generally follow a rule of construction favouring early vesting".

Conditions Subsequent. The second kind of condition, the one that will principally concern us here, is a condition of defeasance, known as a condition subsequent. These operate to defeat an estate which has already vested. For example: 'to C in fee simple, but if he ever becomes a member of the Law Society of Upper Canada, to D in fee simple'. If C acquired the land in 1960 with this condition attached, the estate was vested at that time but was liable to be divested at a future date if C became a lawyer.

These conditions of defeasance are personal if they relate to the person; if C died in possession and never having joined the legal profession, his heirs will inherit a fee simple absolute. But they are not personal, will go with the land, if the condition relates to use of the land itself.

While I have used the term "fee simple" here, any estate can be made subject to conditions.

There are two kinds of conditions subsequent, which are conceptually distinct and which have different consequences if the condition is breached or found invalid. This is an area of excessive technicality which, as with future interests generally, I choose to skip over. More about it can be found in Ziff, *Principles of Property Law*, fourth edition, pp. 222-225. For current purposes you need only to know the distinction between a condition precedent and a condition subsequent.

E) CONDITIONS AND UNCERTAINTY

This section and the next consider why the courts will intervene and declare a condition to be void. Broadly speaking one can delineate two reasons why courts will strike down conditions: the condition is either uncertain, or it is contrary to public policy.

In addition to considering the formal rules on these criteria, you should read the cases bearing in mind that conditional estates provide an excellent illustration of the relationship between property and power. If the law were to allow grantors to impose any conditions they wished, that would have the effect of increasing the number of strands in every land owner's bundle of rights. But that would also give those land owners substantial power over subsequent land owners (successors-in-title). Often conditions are imposed by one generation on the next, and this issue of controlling the next generation in this way is often referred to "dead hand from the grave" problem - the dead person's hand is permitted to reach out from the grave and control the life of his or her beneficiary. See here the testator's desire to limit his daughter's choice of marriage partner in *Clayton* v. *Ramsden*. Moreover, it is also the case that a legal regime which did not restrict the content of conditions would permit private power to advance ends that are unacceptable if pursued in the public sphere: *Re Noble and Wolf* and *Re Canada Trust and Ontario Human Rights Commission* both raise this problem.

The next two cases deal with uncertainty. Consider what degree of "uncertainty" appears to be required, and why? Neither case is about land, but the rules on uncertainty are the same whether realty or personalty is involved.

SIFTON v. SIFTON, [1938] 3 All E.R. 435 (P.C. - Ont.)

Lord Romer: This is an appeal from a judgment of the Court of Appeal for the province of Ontario, which varied a judgment of Middleton, J.A., given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the court on certain questions arising in the administration of that testator's estate. The testator died on June 13, 1928, leaving him surviving his widow, the respondent Mabel Gable Sifton, and his daughter and only child, the appellant, who was then of the age of 13 years. The will (dated July 12, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows:

I give devise and bequeath all other property real and personal to my executors upon the following trusts namely to manage the corpus of the estate in accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is 40 years of age after which the whole income of the estate shall be paid to her annually.

The will then proceeded as follows: "The payments to my said daughter shall be made only so long as she shall continue to reside in Canada."

tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

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NOTES

1) In *Re Down* (1968), 2 O.R. 16 (C.A.) the testator's will provided in part:

When my said son, Harold Russell Down, arrives at the age of thirty years, providing he stays on the farm, then I give, devise and bequeath all of my estate both real and personal of every nature and kind whatsoever and wherever situate unto my said sons Stanley Linton Down and Harold Russell Down to be divided between them equally share and share alike.

Harold Down, 26 years old and not farming, applied for construction of the will in order to ascertain his rights to his father's estate. The trial judge held that the will created a condition precedent not void for uncertainty. Harold Down appealed, arguing that he had a contingent interest which would vest when he reached 30, attached to which was a condition subsequent which was void for uncertainty.

Do you think the appeal should succeed?

2) In *Blathwayt* v. *Lord Cawley and Others*, [1975] 3 All E.R. 625 (H.L.) the court considered the validity of a condition which prohibited future heirs of the testator from inheriting, or divested the estate once inherited, if any of them should "Be or become a Roman Catholic". Following *Clayton* v. *Ramsden*, is this uncertain?

F) CONDITIONS AND PUBLIC POLICY

The next two cases deal with the meaning of "contrary to public policy". This is a difficult notion to define. It includes conditions contrary to law - which means both conditions mandating an illegal act and conditions which seek to subvert the course of law. An example of the latter is a condition providing for divestment if the grantee becomes a bankrupt. The bankruptcy law of the jurisdiction, not the grantor, provides for the disposition of property on bankruptcy: see *Re Machu* (1882), 21 Ch. D. 838.

Beyond this category, it is difficult to say why the content of certain kinds of conditions attracts judicial disapprobation as contrary to "public policy" and others do not. The best one can do is to describe categories and ascribe the choices traditionally made to the values of the English judiciary. Looking at the cases as a whole, most conditions traditionally held to be invalid as against public policy were considered so because they represented restraints on marriage, conditions encouraging divorce or separation, conditions affecting parental duties, or restraints on alienation. We will not discuss the first three categories any further, and the latter is dealt with at the end of this chapter.

The issue of concern here is the relationship between private property, public policy, and what we now call unacceptable discrimination. As you will have gathered from *Clayton* v. *Ramsden*, "discrimination" has not traditionally been a reason for voiding conditions. The racial and religious distinctions made in the will in that case attracted little comment. *Re Noble and Wolf* deals explicitly with the validity of discriminatory terms - consider in particular the line drawn by the court between private choice and public policy and the concern expressed, especially by Hogg J. A., about not inventing new grounds of public policy. Consider also, by way of contrast, how both concerns are dealt with by the court in the much more recent *Re Canada Trust* case.

You should note that neither of these two cases involves a condition attached to land. *Noble and Wolf* is about a restrictive covenant, a topic we will cover in a later chapter. *Re Canada Trust* is about a charitable foundation and personal property. Do not concern yourselves with these distinctions; the purpose of the cases is to consider what should be the scope of "public policy".

Canada, the population and the classification of that population, under various heads, including nationality and race. The information from which such classification is made is obtained through the inquiries made by census commissioners, enumerators or agents .... It would not be possible for those whose duty it is to obtain information in taking a census of the population to ascertain the precise degree or percentage of any race or blood in an individual. The classification must necessarily be made having regard to the word "race" in its ordinary and popular sense. If the language of cl. (f) of the covenant is regarded in its ordinary and popular sense, this clause cannot be said to be void for uncertainty because the exact degree of race or blood in any person among those set out in the aforesaid clause can not be ascertained .... For the reasons I have given, I think the appeal should be dismissed, with costs against the appellants.

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NOTES

1) Following the Court of Appeal's decision in *Re Noble and Wolf* the Ontario legislature amended the *Conveyancing and Law of Property Act* by adding the following section [now s. 22]: "Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place or origin of any person is void and of no effect." Consider precisely how this would affect the covenant in *Re Noble and Wolf*?

2) An appeal of the Ontario Court of Appeal decision was allowed by the Supreme Court of Canada, but principally on the ground that the covenant did not satisfy the requirements of an enforceable restrictive covenant: see *Noble* v. *Alley*, [1951] S.C.R. 64. (Note that we will deal with restrictive covenants later in the course). Four of the seven judges also stated, as an alternative ground of invalidity, that the covenant was uncertain.

3) For a full discussion of this case and its context, see J. Walker, "*Race*". *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Osgoode Society for Canadian Legal History 1997), chapter four.

NOTES

1) A number of Canadian cases have dealt with conditions and public policy in the context of inherent characteristics or beliefs. Consider whether the following would have been decided differently had the courts had the reasoning of the Ontario Court of Appeal in Re Canada Trust and Ontario Human Rights Commission before them?

a) In Re Rattray (1973), 38 D.L.R. (3d) 321 (Ont. H.C.), affd. (1974), 44 D.L.R. (3d) 533 (C.A.) approximately $13M was left to Queen's University to provide scholarships or bursaries. One of the conditions was that they should not be awarded "to any student who is a communist, socialist or a fellow traveller". On an application by the University the condition was struck down for uncertainty. The case generated some publicity and a letter writer to the Globe and Mail, 17 September 1973, said in part: "The university ... had no qualms about accepting the money on this basis. Now that ... Rattray is ... dead they apparently find it morally proper to alter his conditions, without the acceptance of which the money would not have been given to them in the first place .....[H]is money will henceforth be made available to persons whose political philosophy he deplored, even though he took pains to develop the point that it should not. I believe this court's decision should be appealed, not only to safeguard the intents of the deceased person who has given so generously, but to safeguard the inviolability of trust funds in general and the intents that gave them birth".

On the issue of uncertainty, the letter writer agreed that there "is ... no precise definition" of terms like socialist, communist, or fellow traveller. But the problem could be dealt with by asking each student who applied to the fund: "can you in conscience subscribe to its intent in accepting this scholarship"?

b) In Re Hurshman (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) the testator left property which his daughter would inherit "provided she is not at that time [the time when the will took effect] the wife of a Jew". This will was made a month after Mr. Hurshman's daughter married Ivan Mindlin, who all parties to the case agreed was by "lay definition" Jewish. McInnes J. held that the condition "is directly contrary to public policy" because "in order for the daughter to inherit she must divest herself of her husband".

c) Re Metcalfe (1972), 29 D.L.R. (3d) 60 (Ont. H.C.) involved a testator who provided for a scholarship fund in his will. McGill was to provide a scholarship for a male medical student unable to finance his own studies, who was a Protestant of good moral character, had received a high school education in Ontario, and had shown athletic ability. When the university was informed of this it disclaimed the gift, stating in a letter that "our Scholarship Committee ... will not recommend acceptance of discriminatory gifts such as this for ' a Protestant of good moral character, educated in Ontario and who possesses athletic ability' "

RESTRAINTS ON ALIENATION: GENERAL

The final case here deals with a particular type of condition contrary to public policy - a restraint on alienation, a condition that limits the ability of the grantee to alienate the land. This is a rather complex area, and we will only look at one part of it. As necessary background, however, something should be said about the typical traditional restraint on alienation case. This would be an interest in land given in a will, attached to which would be a condition that if the land is sold to certain persons, or used for a certain purpose, or not first offered to certain persons, then the estate ends. This is sometimes called a "forfeiture restraint" - the estate is forfeit if the condition is broken. There is a long line of cases to the effect that if such a restraint is substantial (which you can take to mean that it would substantially affect the selling price) then it will be voided. A recent example is an attempt to prevent the grantee from conveying to anyone but the grantee's son: *Thibodeau* v. *Thibodeau* (1989), 100 N.B.R. (2d) 156 (Q.B.).

It is often said that restraints on alienation are invalid because they are repugnant to the fee simple. That is, the right to freely alienate is a crucial part of the fee simple and you cannot limit it. This is a circular argument, for there is nothing inherent in the fee simple which requires a full power to alienate. The argument is not only circular, it is also wrong, for two reasons. First, so-called "partial" restraints on alienation are permitted. Using the example just given, had the condition been that the grantee could sell to anyone but the son, it would have been considered only partial. But if some notion of repugnancy is really at the root of judicial policy here, a condition eliminating just one possible purchaser is as repugnant as one eliminating all purchasers. As in so many other areas, the difference is one of degree, not principle.

The second reason why the repugnancy argument does not hold water is that very substantial (but not total) restraints survive court scrutiny if they have been bargained for. The leading case is *Stephens* v. *Gulf Oil Canada Ltd* (1975), 65 D.L.R. (3d) 193 (Ont. C.A.). A three-party agreement for sale of lands contained a clause that if two of the parties wanted to sell they had to offer the properties first to each other, at agreed prices. The agreement stated that if the offeree did not take up this right, the property could be sold to anybody at any price. The requirement to first offer the land to another at a fixed price was challenged as a restraint on alienation. The Court first considered whether this was a condition imposed on the grantee as a necessary pre-requisite to get title, or a contractual provision agreed to by the parties. It was held to be the latter, and thus valid. That is, it is possible to agree to a substantial restraint. Here freedom of contract prevails over "repugnancy". Had the pre-emptive right been a condition imposed, then it would have been void, because the parties would not be able to sell the property at market value.

Laurin deals with circumstances not dissimilar to *Stephens*, yet the court comes to a different conclusion. Try to assess how and why it does so, both as a matter of doctrine and as a matter of policy.